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Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH M. STERN,

Petitioner,

v.

SAFECO, INC., AMERICAN STATES INSURANCE COMPANY, AMERICAN ECONOMY INSURANCE COMPANY, LINCOLN NATIONAL INSURANCE COMPANY, CORAZON GROSSMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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In Propria Persona

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QUESTIONS PRESENTED

1. For Court to make Federal Rules of Appellate Procedure. Rule 38 ("Rule 38") must the court explain why appeal is frivolous?

2. To make Rule 38 award, does there need to be a showing appellant acted in bad faith in bringing the appeal?

3. For Rule 38 award, is appellee required to show not only why case is not meritorious but explain why it is frivolous?

4. Is appeal frivolous, if as herein, issue deciding case (1) is first impression, novel, not entirely settled or clarified, (2) has not previously ruled on by U.S. and California Supreme Courts and Ninth Circuit contrary to appellant's position?

5. Is an appellee required to wait until the appeal is decided before making a Rule 38 motion?

6. Does a federal Court have supplemental jurisdiction when, although there are some background facts in common between a federal and state claim, the duty, and breach thereof, do not arise from the same factual nexus?

7. If a summary judgment is granted upon the basis there is no federal claim, and the facts upon summary judgment are the same as the facts pleaded, if there a failure of federal question jurisdiction, even though the matter was decided upon summary judgment, rather than, a motion to dismiss?

8. If there is no supplemental jurisdiction, which requires the state law cause(s) of action to be dismissed without prejudice, to be pursued in the state court, may an award, pursuant to Rule 38 attorney's fees award be made?

9. Is there a lack of a RICO claim, based upon mail fraud, if the insured is the only victim of the mail fraud?

10. Assuming there need be more than one victim for a RICO violation, ff an insurance company has defrauded several insured's regarding their claim for benefits, is a RICO claim

stated, notwithstanding the fact there insureds are not involved in the same claim?

11. If an insurance company commits many acts of mail fraud, in relation to a one insured's particular claim, is such sufficient to show a continuing threat of unlawful activity, sufficient to state a RICO claim?

12. If an insurance company has committed mail fraud in reference to various insureds claiming benefits under an insurance policy, even if the claims are not related, is such sufficient to show a continuing threat of unlawful activity, sufficient to state a RICO claim?

13. If an insured is damaged by mail fraud, by the insurer in denying benefits, by (1) having paid premiums for which benefits were not provided, (2) in not receiving the benefits and/or (3) having to expend time and effort in responding to the fraudulent representations, are there multiple injuries, if required, to state a RICO claim?

14. If there is appearance of bias requiring recusal of one or two judge, must all judges who issued the Memorandum be recused?

15. When a Court refuses to recuse a judge, must there be an explanation of why the judge is not recused?

16. Should the judges of whom recusal is sought be the judges who decide whether they should be recused?

17. Is there appearance of bias when a judge has (1) represented, as a lawyer, one of the insurance company defendants, (2) owns stock in another of the insurance company defendants, (3) made his career, as a lawyer, representing big business and insurance companies against consumers and insureds, (4) is from the same hometown as one of the insurance company defendants, (5) refuses to correct patently wrong decisions, (6) threatens potential retaliation against a party for filing (a) a recusal motion (b) a brief showing the court's lack of jurisdiction and refuses to allow to have filed an appropriate petition for

rehearing/hearing en banc from an order granting a Rule 38 award, (7) refuses to order stay of a Rule 38 award, pending this Petition; although, the party to whom the Rule 38 award was made agreed to such, if a bond was given, and, (8) states that the Court will not accept any further filings in the case; although, petitioner has not had an opportunity to seek a stay of the Rule 38 award as to some of the parties?

18. Is there appearance of bias when a judge has (1) made rulings, to find against a party, inconsistent with 2 of the judges prior cases, (2) made his career, as a lawyer, representing big business against consumers, (3) refuses to correct patently wrong decisions, (4) threatens potential retaliation against a party for filing (a) a recusal motion, (b) a brief showing the court's lack of jurisdiction and refuses to allow to have filed an appropriate petition for rehearing/hearing en banc from an order granting a Rule 38 award, (5) refuses to order stay of a Rule 38 award, pending this Petition; although, the party to whom the Rule 38 award was made agreed to such, if a bond was given, and, (6) states that the Court will not accept any further filings in the case; although, petitioner has not had an opportunity to seek a stay of the Rule 38 award as to some of the parties?

19. Is there appearance of bias when a judge has (1) refused to correct patently wrong decisions, (2) threatens potential retaliation against a party for filing (a) a recusal motion and (b) a brief showing the court's lack of jurisdiction (3) refuses to allow to have filed an appropriate petition for rehearing/hearing en banc from an order granting a Rule 38 award, (4) refuses to order stay of a Rule 38 award, pending this Petition; although, the party to whom the Rule 38 award was made agreed to such, if a bond was given, and, (5) states that the Court will not accept any further filings in the case; although, petitioner has not had an opportunity to seek a stay of the Rule 38 award as to some of the parties?

20. May a Petition for Rehearing/Suggestion for Rehearing En Banc be filed in regard to a Rule 38 award?

21. May a Court of Appeal refuse to accept a motion for stay, pending a Petition for Writ of Certiorari to this Court, of an

order granting a Rule 38 award?

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Kenneth M. Stern petitions for Writ of Certiorari to the Supreme Court of the United States to review the Memorandum of United States Court of Appeals for Ninth Circuit, affirming District Court's ruling in favor of appellees, and rulings thereafter.

I. OPINION BELOW

April 2, 2001 Court of Appeals, Ninth Circuit issued Memorandum finding for appellees. Court ruled appeal was frivolous awarding respondents' attorney's fees. (App. C & E.)

II. JURISDICTIONAL STATEMENT.

Jurisdiction may or may not have existed in District Court, by 28 U.S.C. 1331, as complaint attempted to allege RICO claim and possible supplemental jurisdiction}.[1] Court of Appeals for Ninth Circuit had jurisdiction, by 28 U.S.C 1291, 1294 as appeal from United States District Court, Central District of California.[2] This court has jurisdiction by 28 U.S.C. section 1254.

Notice of Appeal was filed May 27, 1999. District Court Judgment was entered as to American States group May 3, 1999, as to Grossmans May 5, 1999 and as to Lincoln National Corporation (L.N.C.) May 6, 1999. United States Court of Appeal, Ninth Circuit issued Memorandum, April 2, 2001. First Petition for Rehearing and Suggestion for Hearing

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[1] Whether there was jurisdiction in lower courts is issue, dependent upon whether case was correctly decided. If correctly decided, there was no jurisdiction as to insurer defendants. If case was not correctly decided there may be jurisdiction as to said defendants. There was no jurisdiction as to Grossman defendants.

[2] Scope of jurisdiction as to insurers, if case was correctly decided, was to do nothing more than order case dismissed, without prejudice as to state law causes of action. If case was incorrectly decided there may have been jurisdiction as to insurer defendants. As to Grossman jurisdiction was only to order state law cause of action dismissed, without prejudice. If there was lack of jurisdiction to do any acts other than those stated, there was no jurisdiction to make Federal Rules of Appellate Procedure Rule 38 award.

En Banc, was denied May 11, 2001. (App. D) Order granting L.N.C. and Grossman attorney's fees and denying recusal motion was June 20 11, 2001. (App. E) Second Petition for Rehearing and Suggestion for Hearing En Banc was submitted for filing on or about July 1, 2001 and on August 1, 2001 the Court of Appeal refused to file said document with a statement it would not accept any more documents for filing. (App. F.)

III. CONSTITUTION AND STATUTES.

Following are set forth verbatim in App. A. United States Constitution, Fourteenth Amendment, 18 U.S.C. 1962, 28 U.S.C. 455 (a) and (b)(4), 28 U.S.C. 1367, Federal Rules of Appellate Procedure, Rule 38, Federal Rules of Appellate Procedure, Rule 40 and Federal Rules of Appellate Procedure, Rule 41.

IV. STATEMENT OF THE CASE.

A. Procedural History.

Petitioner sued insurers for breach of contract, bad faith breach of contract and/or R.I.C.O. Petitioner sued Grossman for indemnity. District Court granted insurers summary judgment and Grossmans motion to dismiss. Petitioner appealed. American States filed motion for attorney's fees, pursuant to Rule 38. Court of Appeal affirmed District Court and awarded American States attorney's fees. Petition for Rehearing/Suggestion for Rehearing En Banc was denied May 11, 2001. L.N.C. and Grossman filed Rule 38 motions, granted June 20, 2001. Petitioner filed a motion to recuse three judge panel for appearance of bias, denied June 20, 2001. Petitioner sought to file brief showing there is no federal jurisdiction: denied. Petitioner filed a Petition for Rehearing/Suggestion for Hearing En Banc from June 20, 2001 rulings, which is pending.

B. Factual Summary.

Petitioner was frivolously sued for malicious prosecution. He tendered defense to American States

Insurance Company[3]; as, its homeowners policy, issued to petitioner, covered malicious prosecution actions. Policy had exclusion clause for malicious prosecution "committed" in course of a business, causing American States, among other reasons, to deny coverage.

Petitioner did not dispute malicious prosecution alleged to have been committed was in course of business. He contended, however, since tort was not committed, but merely alleged to have been committed, exclusion did not apply. Petitioner asserted, for exclusion to apply, it would have had to state it excluded malicious prosecution committed or alleged to have been committed; or, coverage does not apply to claims, actions, suits or allegations of malicious prosecution.

Insurer respondents contended committed also meant alleged to have been committed. In denying appellant's claim for insurance coverage, insurers, who were part of an enterprise, made numerous false statements, sent in the mail, to deny coverage. They did such to other insureds to deny benefits.

Petitioner/agent requested indemnity for cost of defense from former client/principal, whom petitioner represented in action underlying malicious prosecution action. Said client(s) refused to indemnify.

V. REASONS FOR GRANTING THE WRIT.

A. Appeal not frivolous.

Big business, including insurance companies, have waged a public relations campaign to convince the populace that in the shadow of every lawsuit ever filed, except those in which such economic titans are the plaintiffs, is a bogeyman

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[3] The policy was issued by American States Economy Insurance, administered by American States Insurance Company which were owned by American States Financial Corporation which was owned by Lincoln National Corporation. Lincoln National Corporation then sold the American States group to Safeco, Inc.

frivolous lawsuit. They have been so successful in their campaign; that, in the current attempt by the United States Congress to pass a patients' bill of rights, the main sticking point is to what extent the insurance companies need to be protected from the bogeyman. Apparently the Court of Appeal, in this case, was brainwashed into believing the appeal was such a bogeyman. However, when light is shined into the shadow, the non-existent bogeyman disappears.

The Ninth Circuit's decision appeal was frivolous is patently wrong. In reaching decision, Ninth Circuit failed to follow other circuit rulings. It failed not only to follow Ninth Circuit law, but, law promulgated by one of judges deciding case. (See argument section)

There are issues, relating to Rule 38, upon which circuits are not in uniformity. For example, many circuits describe Rule 38 awards as sanctions. However, the Third Circuit ruled such awards are not sanction, but, merely damages. Many circuits, including the Ninth Circuit in this case, require no showing of bad faith to make a Rule 38 award. Seventh Circuit so requires.

Potential for a Rule 38 award inures in every appeal. This represents a significant number of litigants which justifies this Court in making sure standards, for such awards, are correct and uniform.

Rule 38 awards, when inappropriate, are particularly offensive to judicial system. They have unwarranted chilling effect upon fundamental right to access to courts. Thus, it is particularly important for this Court to maintain integrity of federal courts, and fundamental constitutional right of access to court, by reviewing patently unfair, unwarranted Rule 38 awards, particularly in light of lack of uniformity in standards used by the circuits.

B. Jurisdiction. Jurisdictional issues also warrant review. Although petitioner has addressed lack of jurisdiction, Ninth Circuit court has ignored the issue. This Court has had scant opportunity to review (1) the common nucleus of fact requirement for supplemental jurisdiction, and, (2) whether

federal jurisdiction fails, after summary judgment motion, if there is no evidence submitted that is not reflected in the facts pleaded, i.e., whether the same ruling would have been made by the procedural devise of a motion to dismiss for failure to state a claim, as was made in summary judgment motion.

C. RICO. RICO law in the various circuits is highly contradictory, as to, its requirements. This appears to be due to a judicial distaste for the claim, except as to what is traditionally viewed as organized crime organizations. As noted below, there is a lack of uniformity concerning how many victims, and injuries are required, and, if they must be part of the same scheme.

D. Appearance of Bias. This is an area where authority is scant, particularly as to this Court. This is particularly so concerning this Court's review of such matters as (1) judges having represented a party to the proceeding, (2) a judging owning stock in another party to the proceeding, (3) a judge having to contradict two of his previous ruling to find against petitioner, (4) whether judges for whom recusal is sought should rule upon recusal motion, (5) whether judges general background, with other factors, should be factored into whether recusal is required, and, (6) whether judges threatening a potential finding of abuse of the appellate process, for doing nothing more than proprietous advocacy.

VI. ARGUMENT.

A. APPEAL NOT FRIVOLOUS.

Rule 38 awards are only made in extraordinary cases.[4] (Federal Trade Commission v. Pantron I Corporation 33 F.3d 1088, 1105 (9th Cir. 1994.) To decide if appeal is frivolous,

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[4] Prosser v. Prosser 186 F.3d 403, 407 (3d Cir. 1999) held although most court discuss Rule 38 awards as sanctions, they are not, but merely procedure to allow recovery of damages. Thus, there is a lack of uniformity, among the circuits, on this issue.

basis of appeal must first be explained.[5]

1. Issues on appeal as to Grossman. Petitioner sought indemnity upon Fidelity Mortgage Trustee Service, Inc. v. Ridgegate East Homeowners Assn. (1994) 27 Cal.App.4th 503 holding if agent,[6] is sued for tort allegedly committed[7] while acting for principal, and plaintiff in underlying action is not successful, agent[8] has right to indemnity, from principal, for defense expense.

Memorandum ruled Fidelity does not apply to attorney/client, to independent contractors or if underlying action is for malicious prosecution. Neither Fidelity nor any other case has held such. That Fidelity does not involve attorney/client, is irrelevant. Fidelity states general rule applying in any principal-agent situation. Memorandum contends Fidelity cannot be authority; as, no case applied it to

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[5] If court was wrong on substantive issues, appeal could not be frivolous.

[6] Fidelity was both an agent and independent contractor. Thus, the Memorandum was incorrect in ruling Fidelity did not apply; as, petitioner was an independent contractor. Petitioner, as was Fidelity, was both an agent as well as an independent contractor.

[7] Appellant is not "barred by illegality" of his act; as, he did not commit alleged malicious prosecution. If mere allegation was enough Fidelity would be nullity. A Fidelity requirement is plaintiff, in underlying action, is, as herein, unsuccessful. Such shows there is no "illegality" to be barred.

[8] When attorney litigates case for client, attorney is both agent and independent contractor, which Grossman and Memorandum did not contest. (Doctors' Co. v. Superior Court (1989) 49 Cal.3d 39, 46 fn. 4.) did not contest such. Witkin, Cal. Proc., Vol. 1, Attorneys, sec. 261, p. 326: "... attorney is an agent of the client ... " Witkin, California Procedure, Vol. 1, Attorneys, sec. 69 p. 103: "Whether employee or independent contractor, an attorney will usually be the agent of the client in transactions in which the attorney acts for the client. (Sullivan v. Dunne (1926) 198 Cal. 183, 192 ...)" Doctors' was decided after Merrit v. Reserve Ins. Co. (1973) 34 Cal.App.3d 858, 881. Assuming Merrit held attorney representing client can only be independent contractor, not agent, such was overruled by Doctors'.

attorney representing client. When general rule is stated, it is applied to specific situation, even if no other court has ruled. (U.S. v. Lanier, 117 S.Ct. 1219, 1227 (1997).)

In Fidelity, Ridgegate was a homeowners association. Bali its management company. Ridgegate/Bali decided to foreclose upon homeowner's property. Bali, for Ridgegate, hired Fidelity, a professional foreclosure trustee, to do foreclosure.

When foreclosure failed homeowner sued Fidelity, Ridgegate and Bali for negligence and fraud. All successfully defended. Fidelity demanded Ridgegate indemnify Fidelity for defense costs.

> "agent is entitled to indemnification by its principal for losses incurred by the agent in the execution of the agency. ... ... principal has a duty to its agent 'who is not barred by the illegality of [her or] his conduct' to indemnify the agent for 'expenses of defending actions by third persons brought because of the agent's authorized conduct ... include 'those [situations] in which the agent has suffered a loss which may not have benefited the principal but in which liability depends upon a conception that because the agent was performing the principal's business it is fair that the principal should bear the incidental losses ... 'Unless otherwise agreed, a principal is subject to a duty to exonerate an agent who is not barred the illegality of [her or] his conduct to indemnify [her or] him for ... (d) expenses of defending actions by third persons brought because of the agent's authorized conduct ... " (Id. 509-511.)

Memorandum addressed wrong issue, relying upon Merrit v. Reserve Ins. Co. (1973) 34 Cal.App.3d 858, holding a principal is not liable to third person for agent's torts. Petitioner agent does not seek to have principle, Grossman,

pay judgment[9] obtained by third party[10] plaintiff in malicious prosecution action). Were Memorandum correct, Fidelity would be nullified.

2. Issues on appeal as to insurers.

Petitioner shows exclusion for malicious prosecution "committed" in his business only applies if he committed such, not if he is merely alleged to have committed, even if he did not do so. Had insurers wanted to exclude malicious prosecution merely alleged to have been committed, it should have written policy as in Redevelopment Authority Cambria County v. Superior Court of Pennsylvania 685 A.2d 581, 454 (1996) where there was business pursuits exclusion, relating to work by attorneys.

"policy shall not apply to **claim(s)** based upon ... any actual **or** alleged errors or omissions committed **or alleged to have been committed** by an insured ... in the rendering of ... services as attorney ... " (emphasis added)

Inclusive part of policy herein refers to claims or suits brought even if groundless, false, or fraudulent. Such language shows insurers know difference between act having been committed vis-a-vis alleged, but, which not committed.

"SECTION II-LIABILITY COVERAGES COVERAGE E-Personal Liability

If a claim is made or a suit brought against an 'insured' for damages because of 'personal injury' ... we will: ...

"provide a defense ... even if the suit is groundless, false or fraudulent."

Exclusionary language states:

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[9] There was none.

[10] Plaintiff in malicious prosecution action.

"SECTION II-EXCLUSIONS ... 2. COVERAGE E-Personal Liability, **does not apply to**: ... b. ...malicious prosecution ... (1) **committed** by or at the direction of an 'insured' in the course of a 'business'" (emphasis added)

Additional language states:

"WORKERS COMPENSATION"... Coverage II **does not apply to** any **suit brought** in ... any court outside the United States Of America ... or to **any action** on such judgment."

Judge Tashima participated in Stanford Ranch, Inc. v. Maryland Cas. Co. 89 F.3d 618, 623 (9th Cir. 1996) with policy stating "'Advertising offense' means libel ... committed or alleged to have been committed ... "[11]

Only 2 cases cited, which define "committed" hold committed means act was done. Memorandum overlooks People v. Garcia (1984) 33 Cal.App.4th 1119, 1127-1128 which differentiates between committing act and having act alleged, without committing such. Garcia held committed means act was done, not merely alleged. Garcia held the

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[11] In American States Insurance Company v. Borbor by Borbor 826 F.2d 888 (9th Cir. 1987) Judge Tashima noted distinction between act committed as different than act merely alleged to have been committed. Borbor was case in which American States Insurance Company sought to avoid responsibility to provide coverage. Judge Tashima was District Court judge. Husband and wife owned a school. Husband was convicted of molesting children. American States alleged wife also committed crimes. Judge Tashima ruled, although it was alleged wife committed crimes, she had not committed crimes.

"Although American States argued at trial that Isabel had aided, abetted, participated in, or ratified James' criminal acts, the district court [Judge Tashima] found she had not. The court stated: 'I find that at most, she may have been a knowing bystander. More likely, she closed her eyes to certain facts to deliberately avoid learning the whole truth' (Memorandum Decision, p. 4) (emphasis added). The court [Tashima] concluded that **Isabel committed no wrongful act** which would deprive her of the policy's coverage (Id.)." (Id. at p. 891)(emphasis added)

Court then told American States and Judge Tashima, policy would not be re-written for American States to broaden exclusion.

meaning was clear.

> "Webster's New World **dictionary** ... `**commit**' means: `4. **to do or perpetrate** ...)
>
> "left it to the trier of fact to determine if defendant had 'committed at least one violation ... ' **Defendant contends that if the Legislature had intended such a result, it would have used the words 'accused' of or 'charged' with instead of 'committed.' However, had the Legislature used the word 'accused' of or 'charged' with instead of 'committed,' as defendant suggests it could have done, it would have greatly enlarged the class of persons falling within its provisions, which the Legislature obviously did not intend. In that situation, regardless of whether the defendant actually committed an enumerated offense**
>
> "'**committed' is clear language** with a **clear meaning** ... " (Ibid)

Memorandum wrongly relies upon Harbor Insurance Company v. Central National Ins. Co. (1985) 165 Cal.App.3d 1029 misreading holding, by taking language out of context, and overlooking language which, if not overlooked, changes what Memorandum wrongly says case held. In Harbor jury decided insured committed malicious prosecution, noted in Harbor's analysis. (Id. at 1033.)

Harbor did not even involve the issue, herein, of whether "committed", as used in an insurance policy exclusion, includes alleged to have committed. However, in addressing issue involved in Harbor, of what stage of proceeding is malicious prosecution committed, if at all, it said committed malicious prosecution means tort was done, i.e. action is filed without probable cause and with malice, not merely alleged. It does not hold malicious prosection is committed, as Memorandum holds, by filing any complaint.

" ... The inquiry ... is when the 'offense' of malicious prosecution is 'committed' ... (Id. at p. 1035.)

'offense' of malicious prosecution is 'committed' upon institution of the **malicious** action against the defendant. (Id. at p. 1036.)

"commencement of the **malicious** action signals the 'commission' ... **tort** is **committed** when the **malicious** action is commenced ... (Ibid)

"element of ... malicious prosecution are (1) the institution of the action (2) without probable cause and (3) with malice (4) termination of the action favorable to the defendant, and (5) resulting damage ... Four of these five elements ... arise upon commencement of the **malicious** action ... focus of the wrong is upon the institution of the suit, with malice and without such probable cause. (Ibid)

"Although favorable termination thus serves to confirm the element of lack of probable cause, the focus of the wrong is upon the institution of the suit, **with malice** and without probable cause. The cause of action does not accrue until favorable termination of the **malicious** action ... but ... the offense is committed upon initial prosecution of that [malicious] action. ... but from the tortfeasor's and the victim's standpoint the 'offense' is 'committed' upon initial prosecution of that[12] action" (Ibid) (emphasis added)

First Investors Corp v. Liberty Mut. Ins. Co. 152 F.3d 162, 167 fn. 4 (2nd Cir. 1998) involved business pursuits

[12] That action refers to action with malice and without probable cause.

exclusion referencing acts committed **or** alleged to have committed.

> "... endorsement provides ... excess policies do not apply to personal injury arising out of 'Errors or omissions committed **or** alleged to have been committed ... in the conduct of the insured's business activities ..." (emphasis added)

United Assoc. Local 38 Pension Trust v. Aetna Ca. & Sur. 790 F.2d 1428 (9th Cir. 1986) stated:

> "Insured may give to the Company notice that it desires to be insured for an additional period ... for **claims** made against the Insured ... by reason of a Wrongful Act ... committed **or** alleged to have been committed ... " (emphasis added)

American States had policy exclusions, in other policies, which excluded both acts committed and acts merely alleged to have been committed. Gerald L. Risner Testamentary Trust v. American States Insurance Co. 91 F.3d 152 (9th Cir. 1996)

> "American States ... issued ... policy .... **excluded**:
>
> (1) 'bodily injury' or 'property damage' arising out of actual, **[or]** alleged ... discharge ..." (emphasis added)

American States Insurance v. Vortherms 5 S.W.3d 538, 540 (1999)

> "we will have no duty to defend the insured **against any 'suit'** seeking damages for 'personal injury' ..." (emphasis added)

Safeco Insurance Co. v. Barnes, 891 P.2d 682, 683 (Or.App.

1995)

> "Safeco ... provisions in the homeowner's policy: one that **excludes** coverage for **claims** 'arising out of business pursuits of any insured ... one that **excludes** coverage for **claims** 'arising out of any premises owned ...' (Id. at p. 394.)(emphasis added)

Other policies have exclusions which include mere making of claim or allegation in addition to excluding acts committed. CNA Casualty of California v. Seaboard Surety Co. (1986) 176 Cal.App.3d 598, 614 referred to "excluding coverage **for** 'any **claim or suit** based upon or arising out of **alleged** false ... or to any **claim or suit** for unfair competition". Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co. (1996) 42 Cal.App.4th 121. 124 had clause which excluded "claim, demand or suit." Mt. Airy Ins. Co. v. Greenbaum 127 F.3d 15, 19 (1st Cir. 1997):

"The policy contains exclusion G which precludes coverage for:

'any claim arising out of or in connection with the conduct of a business enterprise ... " (emphasis added)[13]
Above shows petitioner's position is reasonable, not frivolous.

3. Court's failure to follow Ninth Circuit, and other circuits, standards in finding appeal frivolous.

Braley v. Campbell 832 F.2d 1504, 1514 (10th Cir. 1987) held for Court of Appeal to make Rule 38 award, it must

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[13] Courts note while acts were alleged to have been committed, in a complaint, acts were not committed. Wong v. Swien 267 F.2d 749 (9th Cir. 1959) noted "alleged error committed" but found no error "committed". Havadjias v. Vanguard Ins. Co. 103 F.3d 138 (9th Cir. 1999) noted to set aside settlement for fraud on court, court officer must have "committed" fraud, ruling it was alleged court officers committed fraud, but did not do so.

explain why appeal is frivolous.[14] While Braley says usually court's decision of case would suffice, such is not case herein: as, Memorandum does not explain why appeal is frivolous. other than vague conclusion result is obvious. Court cannot state why appeal is frivolous; as, it patently is not.

Petitioner as previously carefully, detailed and correctly explains why (1) Harbor does not apply, except to support petitioner, (2) Garcia, other cases and insurance policies distinguish between committed versus alleged to have been committed, (3) Fidelity is directly on point in petitioner's favor. (4) Merritt Reserve does not involve indemnity issue, (5) why petitioner's reliance on Harbor, Garcia, other policies and Fidelity is not frivolous, and, (6) Court's rulings against petitioner are of 1st impression; thus, cannot be frivolous. Court does not explain why it is right, why petitioner is wrong.

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[14] Braley, which involved a three judge panel unpublished decision wherein Federal Rules of Appellate Procedure, Rule 38 award was made. not only did Braley determine such ruling could be subject to en banc review, the 10th Circuit granted en banc review and reversed the Rule 38 award. The Ninth Circuit, in this case, refused to consider petitioner's Petition for Rehearing/Suggestion for Rehearing En Banc from the Court's granting L.N.C. and Grossmans' Rule 38 motions. Thus, the Ninth and Tenth Circuits are not in uniformity on this issue.

Also, in it order refusing to file the Petition for Rehearing/Suggestion for Rehearing En Banc the Ninth Circuit stated it would not accept any further filing from petitioner. That is despite the fact that petitioner has not been given the opportunity, as required by Federal Rules of Appellate Procedure, Rule 41, to move the court for an order staying the Rule 38 award,, pending this Court's determination of this petition.

The Ninth Circuit's refusal to consider said petition, or file a motion to stay said Rule 38 awards, it violated appellant's right pursuant to the United States Constitution, Fourteenth Amendment. When the judicial system establishes procedures to be applied to all similarly situated, they have an equal protection right to application of laws to them. (Truax v. Corrigan, 257 U.S. 312, 334 42 S.Ct. 124 (1921); Myers v. Ylst 897 F.2d 417, 421 (9th Cir. 1990); Williams v. Oklahoma, 395 U.S. 458, 89 S.Ct. 1818 (1969).) In Williams one was given the right to appeal. However, the right having been given, it was then taken away by denying the person the means to appeal. The Court ruled the person could not be given a right then have it taken away, without violating equal protection of the laws.

Depoister v Mary M. Holloway Foundation 36 F.3d 582, 587 (7th Cir. 1994) held there must be bad faith, which has not been found herein. Court is not in uniformity with Seventh Circuit.

Judge Tashima wrote Opinion stating where law has not been "clarified", appeal is not frivolous. (Barnes v. Logan 122 F.3d 820, 825 (9th Cir. 1997).) Herein, it had not been clarified committed means "alleged to have been committed." or Fidelity does not apply to situation herein. Decision herein is not in uniformity with Ninth Circuit.

If issue is of 1st impression, as herein, appeal is not frivolous. (Estiverne v. Sak's Fifth Avenue 9 F.3d 1171, 1174 (5th Cir. 1993) Ehm v. Amtrak Board of Directors 780 F.2d 516, 518 (5th Cir. 1986) held if issue is novel, appeal is not frivolous. Court is not in uniformity with Fifth Circuit.

Taylor AG Industries v. Pure-Gro 54 F.3d 555, 563 (9th Cir. 1995) held although Supreme Court and 7 circuits ruled against Taylor's position, since Ninth Circuit had not ruled contrary to position, appeal was not frivolous. Royal Insurance Company v. Sea-Land Service Incorporated 50 F.3d 723, 730 (9th Cir. 1995) held in absence of prior Ninth Circuit law appeal is not frivolous. Herein decision is not in uniformity with Ninth Circuit.

Stroh Container Co. v. Delphi Industries, Inc. 783 F.2d 743, 753 (8th Cir. 1986) held if issues are not entirely settled, appeal is not frivolous. Ninth Circuit is not in uniformity with Eighth Circuit.

If there are similar prior rulings, if issues are not identical, fees are not allowed. (Khan v. Gallitano 180 F.3d 829, 837 (7th Cir. 1999).) Ninth Circuit is not in uniformity with Seventh Circuit.

If Supreme Court has not rejected petitioner's position, appeal is not frivolous. (Jane L. v. Bangerter 61 F.3d 1505, 1514 (10th Cir. 1995).) Ninth Court is not in uniformity with Tenth Circuit.

Biodex Corp. v. Loredan Biomedical, Inc. 946 F.2d 850, 863 (Fed. Cir. 1991) held if appellee wants Rule 38 fees, it must refer to petitioner's briefs, and specifically discuss why his position is not only wrong, but frivolous. Ninth Circuit is not in uniformity with Federal Circuit, as neither respondents did not explain why petitioner's position is not only wrong but frivolous.

If there are similar prior rulings contrary to appellant, if issues are not identical, appeal is not frivolous. (Khan v. Gallitano 180 F.3d 829, 837 (7th Cir. 1999).) Assuming arguendo Harbor and Merritt, upon which Memorandum relied, are contrary to petitioner, issues in those cases would be merely similar to, not identical with, issues herein. Thus, Ninth Circuit is not in uniformity with the Seventh Circuit.

4. Rule 38 motion may not be brought before appellate court renders decision on merits.

American States brought Rule 38 motion before Memorandum issued. Petitioner objected to such as being unfair: as, to oppose the motion petitioner would have to assume the appeal was not meritorious, then explain why it is not frivolous. Knoblauch v. Commissioner 752 F.2d 125, 127 (5th Cir. 1985) held a Rule 38 motion is not to be filed until after the appeals court's decision on the merits. This makes sense: as, otherwise an appellant is required to argue against him or her self. Appellant must assume its position is incorrect, then argue although wrong, the position is not frivolous. Such would be unfair: thus, a violation of Due Process. Thus, the Ninth and Fifth Circuits are not in uniformity.

B. IF LOWER COURT'S DECISION ON RICO AND POLICY INTERPRETATION ARE CORRECT, FEDERAL COURTS DID NOT HAVE JURISDICTION OVER STATE CLAIMS, REQUIRING SUCH TO BE DISMISSED WITHOUT PREJUDICE. NOR WAS THERE JURISDICTION TO FIND APPEAL WAS FRIVOLOUS, OR, AWARD ATTORNEY'S FEES.

If District Court and Ninth Circuit's decision the

Complaint did not state a federal claim, is upheld, there is no jurisdiction over state law claims or to grant Rule 38 fees. Once decision was made there was no federal claim, state law claims were required to have been dismissed, without prejudice. As such Ninth Circuit had no jurisdiction to decide state law claims, including its decision appeal is and awarding Rule 38 attorneys fees. The only jurisdiction was to remand state law claims, to District Court, with order that Court to dismiss state law claims, without prejudice.

1. No federal question jurisdiction.

United States Constitution Article III section 2 requires there be claim or controversy. Such may arise, pursuant to federal question jurisdiction, when federal claim is properly pleaded, or, state claim requires, as a necessary element, proof of a federal question. Long v. Bando Manufacturing of America, Inc. 201 F.3d 754 (6th Cir. 2000) noted:

"in determining original 'arising under' jurisdiction, federal courts apply the 'well-pleaded complaint' rule, pursuant to which "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Id. at 392. ..."

"federal courts have jurisdiction in 'only those cases in which a well-pleaded [c]omplaint establishes either that federal law creates the cause of action or that the plaintiff['s] right to relief necessarily depends on resolution of a substantial question of federal law' ... (Id. at pp. 759-760.)

Chicago v. International College Of Surgeons, 118 S.Ct. 523 (1997) ruled, when federal jurisdiction exists:

> "The district courts have original jurisdiction under the federal question statute over cases 'arising under the Constitution, laws, or treaties of the United States.' Section 1331.
>
> 'It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues

of federal law.' ...

> "however, "[e]ven though state law creates [a party's] causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law."... (Id. at p. 529.)

If there is no federal case or controversy, federal courts do not have jurisdiction. (U.S. v. Mercy Health Services 107 F.3d 632, 635 (8th Cir. 1997). Petitioner attempted, as against some of the American States group, to plead federal claims for RICO. District Court ruled petitioner did not have such claims; as, there was no insurance coverage. The Memorandum ruled since there was no insurance coverage, there was no mail fraud relating to statement there was no coverage. The basis for such ruling encompassed allegations of the complaint.

That matter was decided upon summary judgment does not matter. Basis of decision negates any federal claim attempted to be pleaded in complaint; as, there was no evidence presented upon summary judgment not represented by allegation in complaint.

District Court also ruled as to party with whom petitioner has settled, there was no RICO claim; as, there was only one victim and one injury pleaded. The same situation exits as to American States. Thus, the decision, if correct, defeats federal question jurisdiction as to RICO claim.

2. No supplemental jurisdiction.

Complaint pleads state claims against insurers and Grossman. Grossmans were named, with no federal claim attempted to be stated against them, as pendent parties, arising from different breach of duty than American States.

Once District Court ruled petitioner had no federal claims, District Court, and Ninth Circuit, lost jurisdiction over

state claims. Federal court may only dismiss such, without prejudice.[15]

United Mine Workers v. Gibbs 383 U.S.715, 725-726, 86 S.Ct. 1130, 1138 (1966) ruled if complaint does not set-forth properly pleaded claim upon a substantial federal question, there is no supplemental jurisdiction. Dismissal of state claim is mandated.

"Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense[16], the state claims should be dismissed as well." (Id. at p. 726.) (emphasis added)

Chicago v. International College Of Surgeons, supra, 118 S.Ct. 523 recognized supplemental jurisdiction depends upon existence of claim, properly pleaded, dependent upon federal issue

> "principles of pendent and ancillary jurisdiction by which the federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims ... Congress has codified those principles in the supplemental jurisdiction statute, which combines the doctrines of pendent and ancillary jurisdiction under a common heading. 28 U. S. C. Section 1367. The statute provides, 'in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States

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[15] Supplemental jurisdiction, pursuant to 28 U.S.C. 1967 is dependent upon the court having original jurisdiction.

[16] e.g. failure to serve complaint, lack of subject matter jurisdiction, summary judgment determination there are no triable issues of fact.

> Constitution.' Section 1367(a). (Id. at pp. 529-530.)

Randolph v. Budget Rent-A-Car 97 F.3d 319, 329 (9th Cir. 1996) held when there is no federal question or diversity jurisdiction, there is no supplemental jurisdiction.

> "Original jurisdiction did not lie in federal court ... A District Court may exercise supplement jurisdiction over claims which are 'so related to claims in the action within which such original jurisdiction that they form part of the same case or controversy under Article III ... ' 28 U.S.C. 1967. However, when original jurisdiction doe not exist for the principal claim, federal court may not exercise supplemental jurisdiction over the remaining pendent claims. Simply put, failure of the original jurisdiction precludes application of supplemental jurisdiction."

Hoge v. Mountain States Tel. & Tel. Co. 555 F.2d 254, 261 (9th Cir. 1977) held if, even after summary judgment, it is determined there is no federal question subject matter jurisdiction, there is no supplemental jurisdiction. In such situation it is mandated said state law claims be dismissed without prejudice.

"concluded that appellant stated no federal constitutional or statutory claim. The district court also granted summary judgment against appellant on his state law claims. ... In light of our disposition of the federal claims, we feel that it is appropriate to remand the state law claims to the district court with instructions to dismiss for want of federal jurisdiction."

In Reynolds v. County of San Diego, 84 F.3d 1162 (9th Cir. 1996) District Court found, upon summary judgment, law enforcement officers had qualified immunity for actions sued upon, thus barring, federal claim and state constitutional claim, dependent upon federal claim. Reynolds ruled, in such circumstance, dismissal, without prejudice, of state common law claims, not dependent upon existence of a federal question,

was mandatory.

> "However, following Gibbs, we explained, 'in light of our Disposition of the federal claims, we feel that it is appropriate to remand the state law claims to the district court with instructions to dismiss for want of federal jurisdiction.' Id.
>
> "More recently, the Circuit vacated a district court's judgment dismissing both state and federal claims. We determined that the district court did not err in dismissing the pendent state law claims after all of the federal claims were dismissed, but vacated the judgment with instructions that it be modified to make clear that dismissal of the pendent claims [was] without prejudice.'" (Id. at p. 1171)

Thus, as there was no federal claim properly pleaded, based upon lower courts' rulings, there was no supplemental jurisdiction.[17]

3. No supplemental jurisdiction over Grossman. As to Grossman, claim was made for state law indemnity not related to breach of insurance agreements upon which federal claims were attempted to be stated. While background facts, concerning underlying frivolous malicious prosecution action against petitioner, and remedies, are same as to insurers and Grossman, pleaded facts establishing duties, and breaches, as to Grossmans and insurers are different.

Insurers duty arose from insurance contracts, breached by insurers. As to Grossman duty arose from principal/agent relationship, breach being failure to indemnify.

For a federal court to have pendent jurisdiction of a

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[17] Only relevant and jurisdictional effect of determination there was no coverage under involved insurance policy would be for limited purpose of determining there was no federal claim [pleaded], and thus no jurisdiction.

state law based cause of action, the pendent state law claim must have a common nucleus of facts, relating to the duty and breach thereof, from which the federal claim also arises. (Stevedoring Services of America, Inc. v. Eggert 953 F.2d 552, 557-558 (9th Cir. 1992) In Eggert plaintiff had two claims against defendant. One claim was within jurisdiction of federal court. The second claim, although between same parties and with a general background of common facts, was based upon a different duty and different breach. As such, there was no supplemental jurisdiction.

> "Pendent claims must derive from a nucleus of operative fact held in common with claims for which there is an independent basis for federal jurisdiction, and they must be such that they ordinarily would be expected to be tried in a single proceeding with the federal claims. ... claims here, however, are independent of one another. Stevedoring's claim for enforcement of the May 19, 1987 attorney's fees order is quite distinct from Stevedoring's claim for recovery of alleged overpayments of disability compensation under state law. ... (Id. at p. 558.)

In Hutchinson on Behalf of Baker v. Spink 126 F.3d 895 (7th Cir. 1997) a child was killed, though improper use of farming equipment, while in foster care. An action was brought against (1) social workers and foster parents, and (2) manufacturer of the machinery. The action against the government official was based upon violation of federal law. The action against the manufacturer was based upon state law. The court ruled that although there was a common factual background as to what led to the child's death, and common facts concerning damages, since duties, and breaches thereof, were based upon different facts, there was no common nucleus of facts necessary for supplemental jurisdiction. The duty, and breach, concerning the government involved those pertaining to placing a child in a safe foster care environment. The duty and breach relating to the farm equipment manufacturer related to product safety. The Court wrote:

> "Last, we agree entirely with the district court

that the claims against the unfortunately named Kill Brothers Company were correctly dismissed on jurisdictional grounds. ... link between these claims and the constitutional claims is too weak to support supplemental jurisdiction. Hutchinson argues that Kill Brothers was negligent in manufacturing the Killsbro Gravity Box and in failing to warn users of its dangers. These allegations are not 'so related to claim in the action within such original jurisdiction that they form part of the same case or controversy' as the supplemental jurisdiction statue requires. 28 U.S.C. 1967. ... " (Id. at p. 902.)

In Barwood, Inc. v. District of Columbia 202 F.3d 290 there were two disputes involving the same general factual background. The first dispute involved claims by taxi cab companies that their regulating governmental body, did not have authority to place certain restrictions upon the taxi cab companies. The second dispute arose when one of the taxi cab companies claimed that one of the government officials deliberately rammed his automobile into one of the taxi cabs in retaliation for the taxi cab companies bringing their federal claims. The Court ruled that although both claims arose from the same generalized factual background, the alleged duties, and breaches thereof, did not derive from the same nucleus of operative facts.

" ... allowance of such supplemental jurisdiction would be either improper for want of a 'common nucleus of operative fact ... ' ... " (Id. at p. 296.)

In Hudson v. Delta Air Lines, Inc. 90 F.3d 451, 455-456 (11th Cir. 1996) there was an ERISA cause of action, over which the federal court clearly had jurisdiction. That cause of action concerned whether employees were entitled to certain benefits. There was also a state law based claim, of which Court had to determine whether there was supplemental jurisdiction. That claim also concerned whether employees were entitled to certain benefits; however, the benefits were different benefits than those claimed under the ERISA cause

of action. In ruling there was no supplemental jurisdiction. the Court wrote:

> "The record shows that the flight privileges at issue in Count V were not part of an ERISA benefits plan and were administered by a different department of Delta. Moreover, the alleged facts underlying Count V are complete unrelated to the allegations is support of the ERISA claims. The only factor they share in common is that the airline's decision with respect to ERISA benefits and flight benefits affected certain retirees. This does not provide a sufficient nexus between the federal and state causes to support supplemental jurisdiction. ... " (Id. at p. 456.)

As there is no common nucleus of facts, there is no jurisdiction.

4. No supplemental jurisdiction over insurers as to breach of contract claim.

There was no common nucleus of facts as to RICO and breach of contract claims. In breach of contract claim duty is to perform contract, breach is refusal to perform. In RICO duty is to not use mail in fraudulent scheme, breach is mail fraud. While there are common background facts, facts as to duty and breach are not common.

5. With no jurisdiction to decide state claims on merits, there was no jurisdiction to decide if appeal was frivolous.

Because there is no jurisdiction to decide merits of state claims, there was no jurisdiction to decide if appeal was frivolous or award Rule 38 attorneys fee's. Until there is decision on merits, there can be no decision petitioner's position was frivolous.

As there is no jurisdiction over state claim, petitioner is entitled to pursue such in state court. It may be state court will agree with petitioner concerning merits of his position on

relevant issues on the case. This would create an anomalous and inconsistent situation wherein, Rule 38 award is made: although, petitioner eventually prevails on merits of case.

Petitioner is supported by Popham v. City of Kennesaw 820 F.2d 1570, 1583 (11th Cir. 1987). Although Popham is procedurally somewhat different, the relevant principle derived therefrom is the same. Popham held since petitioner prevailed upon state claim, related to federal claim, federal claim could not be frivolous. Thus, since merits of case remains to be decided, in state court, whether appeal was frivolous cannot be decided. Ninth Circuit is not in uniformity with Eleventh Circuit.

C. RICO CLAIM STATED.

District Court ruled insured denied benefits cannot state RICO claim, as, (1) there is only one victim, which shows, (2) there is absence of threat of continuing activity. In Re Burzynski 989 F.2d 733, 744 (5th Cir. 1993), Hofstetter v. Fletcher 905 F.2d 897 (6th Cir. 1988) and Brownell v. State Farm Mut. Ins. Co. 757 F.Supp. 526 (E.D.Pa. 1991) held insurance company can be liable for not providing benefits.

(H.J. Inc. v. Northwestern Bell Telephone Co. 492 U.S. 292, 240, 109 S.Ct. 2893 (1989) held pattern is formed if predicate acts involve same or similar (1) purposes (2) results (3) participants (4) victims (5) methods of commission or (6) otherwise are interrelated by distinguishing characteristics and are not isolated events. Relying upon (Medallion Television Enterprises, Inc. v. Select TV of California, Inc. 833 F.2d 1360, 1363-1364 (9th Cir. 1987) and Uniroyal Goodrich v. Mutual Trading 63 F.3d 516 (7th Cir 1995), District Court concluded multiple victims are required to be part of same scheme to defraud, rather than, being victims of independent, but similar, schemes to defraud. If District Court's interpretation is correct, 9th and 7th Circuit are not in accord with H.J Inc..

Petitioner pleaded multiple victims, being, those who purchased policies and were defrauded, through mail, by denial of benefits. As to American States/Economy it includes

insureds who purchased policies covering malicious prosecution defense.

Petitioner need plead only one other victim, if at all, which he did. There need not be multiple victims. In said cases cited by District Court, victims had only one injury. Had same victim suffered multiple injuries, such would have been sufficient.

Herein, each time American States mailed a falsehood, requiring response, petitioner was damaged, having to take the time to respond. Also petitioner was damaged, (1) in paying premiums for benefits not received, and, (2) not receiving required benefits.

Marshall & Ilsley Trust Co. v. Pate 819 F.2d 806, 809 (7th Cir. 1987) held need show damages from only one predicate act. District Court was incorrect in holding otherwise.

D. APPEARANCE OF BIAS EXISTED.

28 U.S.C. 455 (a) requires appearance of bias, not actual bias. (Liljeberg v. Health Services Acquisition Corp. 486 U.S. 847, 861-862, 108 S.Ct. 2194, 2202-2203 (1988).) If appearance of bias is shown, judgment may be set-aside. (Id. at p. 862-870, 2203-2207.)

Matters outside court's ruling, on involved case, are extra judicial factors which may be looked to in deciding if appearance of bias exists. (Liteky v. U.S. 510 U.S. 540, 114 S.Ct. 1147 (1994) While rulings on case alone rarely constitute source for bias, (1) such are not completely precluded from being used, by themselves, to show appearance of bias, and, (2) rulings in case, in combination with extrajudicial factors, may show appearance of bias. (Id. at pp. 555, 1157.)

Appearance of bias exists where judge has financial interest in party to proceeding or any other interest that could be substantially affected by proceeding. 28 U.S.C. 455 (b)(4).)

Not only have the three judges refused to correct their patently incorrect rulings, they threatened petitioner with a charge of possible abuse of the appellate process. This was for doing nothing more than the perfectly proprietous acts of filing a recusal motion and informing the Court there was a lack of federal jurisdiction.

A. Judge Zilly.

He was partner, for 20 years, in law firm primarily representing insurance companies and large corporations against individuals and consumers. His lawfirm represented L.N.C.'s main subsidiary.

As of 1988 he, as trustees for his sons, he controlled several hundred shares of Safeco stock. It unknown if he still does. If he does still have interest in Safeco, it shows appearance of bias. Even if he divested his interest, his close association with Safeco, in combination with other noted factors, shows appearance of bias. He and Safeco are prominent citizens of same home town, Seattle, of which petitioner is not. That Judge Zilly, at one time if not now, had financial interest in Safeco shows his affinity for it.

B. Judge Tashima.

In participating in Memorandum's incorrect ruling appeal is frivolous. Judge Tashima violates rule he set-forth, in Barnes v. Logan, supra, 122 F.3d at p. 825); appeal is not frivolous where issue has not been clarified. He recognized in American States Insurance Company v. Borbor by Borbor, supra, 826 F.2d 888 there is difference between committed and alleged to have been committed. Determining appeal herein is frivolous for taking same position shows appearance of bias. He does in this case, exactly what Ninth Circuit ruled could not be done Borbor, which is to rewrite insurance policy, for American States, to create non-existent exclusion.

He participated in Stanford Ranch, Inc. v. Maryland Cas. Co., supra, 89 F.3d 618, 623 which involved policy stating:

"'Advertising offense' means libel ... committed

or alleged to have been committed during the policy period. ... "

C. Judge Fisher.

There is nothing more specific than Judge Fisher's corporate background, and patently wrong decision in Memorandum, particularly as to frivolous ruling, showing appearance of bias. Although Judge Fisher, with other judges, have been given opportunity to correct their incorrect rulings, they refuse to do so. At times decision alone may show appearance of bias. Here, such in combination with taint of having decided case after deliberations with two judges for whom an appearance of bias is shown, would require panel disqualification.

Dated: August 8, 2001

KENNETH M. STERN

BY:_____
KENNETH M. STERN,
IN PROPRIA PERSONA.

APPENDIX A

1. United States Constitution. Fourteenth Amendment:

"Section 1... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. 18 U.S.C. 1962:

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of

which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

3. 28 U.S.C. 1367:

"(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional

circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

4. Federal Rules of Appellate Procedure. Rule 38:

"If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

5. Federal Rules of Appellate Procedure. Rule 35:

"... (b) (1) The petition must begin with a statement that either:

(A) the panel decison conflicts with a dcision of the United Stateas Supreme Court or the court to which thepetiton is addressed(with citation ot the conflicting case or cases) and consideration by the full court is therefor necessary to secure and maintain uniformtiy of the court's deciosns: or.

(B) the proceeeding involves one or more questionso fo exceptional importanfe. each of which must be consicsely stated; for example.a petition may assert that a proceeding presenta a quetion of exceptional imporance if it involves an issue on whih the panel decsison conflicts with the authoritaie decisions of other Courts of Appeals that have addressed the issue. ...

6. Federal Rules of Appellate Procedure. Rule 40:

" ... (2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. ... :

7. Federal Rules of Appellate Procedure. Rule 41:

"(d) Staying the Mandate

(2) Pending Petition for Certiorari.

(A) A party may move to stay the mandate pending the filiong of a petitioner for a writ of certiorari in the Supreme Court. ... "

APPENDIX B

FILED
CLERK U.S. DISTRICT COURT
APR 19 1999
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH M. STERN,

Plaintiff,

v.

FARMERS INSURANCE GROUP OF COMPANIES, et al.

Defendants.

Case No. CV 98-7654 CM

ORDER ON MOTIONS

. . .

2. Rico causes of action

In his first amended complaint, Stern has alleged that American Economy's declination of his defense represents an ongoing business practice constituting mail fraud. First amended complaint ¶ 35. However, as the court has found, there was no breach of contract nor of the implied covenant of good faith and fair dealing. As such, that same conduct cannot possibly be fraudulent for the purposes of a RICO cause of action. Stern alleges no facts to create a genuine issue over whether fraudulent behavior took place. Consequently, summary judgment shall be granted as to the RICO claims against Lincoln, American States, American Economy, and Safeco Corporation. ...

There are two separate problems with Stern's pleadings: (1) the presence of a single plaintiff at the center of the alleged enterprise; and (2) the absence of a threat of continuing activity by the predicate acts alleged. ...

In its Order on the Motion to Dismiss, the Court previously observed that any attempt to defraud a single plaintiff is not sufficient to demonstrate a pattern of racketeering activity. Saver v. Alaska Pulp Corporation, 978 F.2d 1529, 1535-36 (9th Cir. 1992); Medallion Television Enterprises, Inc. v. Select TV of California, Inc., 833 F.2d 1360, 1363-64 (9th Cir. 1987). In Sever, the court of appeals found that plaintiff had not asserted a 'pattern' under RICO where defendants' conduct was 'in a sense a single episode having the single purpose of impoverishing [plaintiff].' 'The circumstances of the case [] must suggest that the predicate acts are indicative of a threat of continuing activity.' Medallion, 833 F.2d at 1363. It is clear from the face of the Complaint that Stern has offered no facts to support Stern's allegations.

Indeed, Medallion's facts are also analogous to this case: in that case, RICO claims involved a series of activities taken in order to induce the plaintiff into a contract. Id. At 1363. Here, the acts taken involved a series of acts taken pursuant to a contact previously agreed upon: once the denial to defend had been asserted, the fraud, if indeed it was a fraud, was essentially complete. See id. at 1364. Plaintiff's citation of Uniroyal v. Mutual Trading Company, 63 F.3d 516, 522 (1995) at oral argument does not help his claim. Indeed, the Uniroyal court itself observed that '[m]ultiple acts of mail fraud in furtherance of a single episode of fraud and involving one victim and relating to one basic transaction cannot constitute the necessary pattern'" Id., quoting Jones v. Lampa, 845 F.2d 755, 757 (7th Cir. 1988) Furthermore, while it is true that Uniroyal permits a RICO cause of action to be asserted in a case involving a single plaintiff, the case suggests that in a situation motion to dismiss and his assertions at oral argument fail to contain any factual basis for a violation of RICO. Altogether, these omissions point to the only realistic conclusion that the Court can reach: Plaintiff cannot, and will not be able to state a claim for a RICO

violation based upon a single instance of a denial to defend based upon his own undisputed behavior. In all of the pages spread before the Court, Plaintiff has still not pled sufficient facts to suggest that the Defendant's violation of the RICO statutes was the proximate cause of his injury. Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 112 S.Ct. 1311 (1992). ...

APPENDIX C

FILED
APR 2 - 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH M. STERN,
Plaintiff-Appellant.

v.

FARMERS INSURANCE GROUP OF COMPANIES; TRUCK INSURANCE EXCHANGE; AMERICAN STATES INSURANCE COMPANY; DEAN GROSSMAN, individually and on behalf of the Grossman Family Trust; CORAZON GROSSMAN, individually and on behalf of the Grossman Family Trust; AMERICAN ECONOMY INSURANCE COMPANY; SAFE CORPORATION; AMERICAN STATES FINANCIAL CORPORATION; LINCOLN NATIONAL CORPORATION.

Defendants-Appellees.

No. 99-55980

D.C. No. CV-99-07654-CM

MEMORANDUM[1]

Appeal from the United States District Court

for the Central District of California

Carlos R. Moreno, District Judge, Presiding

Submitted February 16, 2001[2]
Pasadena, California

Before: TASHIMA and FISHER, Circuit Judges, and ZILLY, District Judge.[3]

Appellant Kenneth M. Stern appeals the district court's grant of summary judgment in favor of appellees the American States Insurance Company group of companies (collectively 'American States',[4] and appeals the district courts grant of dismissal for failure to state a claim upon which relief can be granted in favor of appellees the Grossmans.[5] We

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir.R. 36-3

[2] This panel unanimously finds this case suitable for decision without oral argument. See Federal Rules of Appellate Procedure 34(a)(2).

[3] The Honorable Thomas Zilly, United States District Judge for the Western District of Washington, sitting be designation.

[4] The related companies include American Economy Insurance Company, American States Financial Corporation, Lincoln National Corporation, and Safeco Corporation.

[5] On March 1, 1999, the district court granted Safeco Corporations motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), SER 37, dismissing Sterns claim for spoilation of cause of action, SER 45, and dismissing the RICO claims with leave to amend, SER 51-54. Stern amended his complaint, ER 334 (First Amended Complaint file March

affirm.

Appellant Stern is an attorney practicing in Woodland Hills, California. In 1995, he was sued for malicious prosecution as the result of a lawsuit he filed while acting as attorney for appellees the Grossmans. The malicious prosecution lawsuit was dismissed as a result of settlement in 1998. Seeking to recover the costs he allegedly expended in defending himself against that lawsuit, appellant has sued his homeowners insurance carrier American States and his former clients the Grossmans.

This court reviews a grant of summary judgment de novo. Robi v. Reed, 173 F.3d 736, 739 (9th Cir. 1999). In granting summary judgment for American States, the district judge concluded that because Sterns homeowners insurance policy specifically excluded coverage for malicious prosecution. . .committed by or at the direction of an insured in the course of:(a) a business. ER 442. American States had no duty to defend appellant against a malicious prosecution lawsuit that arose out of his law practice.

Although appellant argues on appeal that he did not actually commit malicious prosecution, but was merely sued for malicious prosecution, under California law a malicious prosecution claim was filed. See Harbor Ins. Co. v. Central Nat'l Ins. Co., 165 Cal.App.3d 1029, 1037 (9185). Because that lawsuit was filed by appellant as part of his professional law practice, the district court properly concluded that appellant's homeowner's insurance policy did not provide coverage for the resulting malicious prosecution claim. And because the district court properly granted summary judgment on the contract claim, it also properly granted summary judgment on the mail fraud and RICO claims against American States because the asserted mail fraud was predicated on American States' practice being a breach of the

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8, 1999). On April 19, 1999, the district court dismissed all remaining claims against all parties. ER 438. Judgment for all defendants was entered during May, 1999. See ER 501-02 (Clerks Record 85, 87, 88, and 91).

policy. With no showing of a contractual violation there can be no showing of fraud or racketeering because the predicate racketeering act alleged was mail fraud.

This court reviews a dismissal for failure to state a claim upon which relief can be granted de novo. Two Rivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999). In granting dismissal in favor of appellees the Grossmans, the district court concluded that Stern could not bring an 'implied indemnity' claim against them to recover the costs of defending himself against the malicious prosecution lawsuit. The district court concluded that, as the Grossman's litigation attorney, Stern acted as an independent contractor; therefore, the Grossmans could not be held liable on an implied indemnity claim for the torts of an independent contractor, ER 455-57. This conclusion is supported by California law. See Merritt v. Reserve Ins. Co., 34 Cal.App.3d 858, 880-81 (9173).[6] The district court properly granted dismissal for failure to state a claim to appellees the Grossmans.

American States has separately moved this Court for an award of attorney's fees pursuant to FRAP 38, 28 U.S.C. §1927, and this court's inherent authority to sanction bad faith conduct.[7] Appellant responded to this motion approximately eight months after it was served on him. Although untimely under FRAP 27(a)(3)(A), this Court will consider appellant's response.

Under FRAP 38, this Court has authority to impose sanctions against a party or counsel who files a frivolous appeal. See Urban v. C.I.R., 964 F.2d 888, 890 (9th Cir. 1992). This appeal is frivolous. See Urban v. Unbelievable,

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[6] Appellant's reliance on Fidelity Mortgage Trustee Services, Inc. v. Ridgegate East Homeowner's Association, 27 Cal.App.4th 503 (1994)m. is misplaced, because that case involved indemnity arising from a standard agency relationship and did not address the status of a litigation attorney as an independent contractor.

[7] The district court has already ordered appellant Stern to pay the reasonable costs of the suit to all appellees. See ER 501-02 (Clerk's Record 85, 87, 88 and 91).

Inc., 71 F.3d 1434, 1441 (9th Cir. 1995)("An appeal is frivolous when the results are obvious or the arguments are wholly without merit.") Appellee American States has documented, by declaration, $11,672.50 in attorney's fees relating to the defense of this appeal. Appellant Stern is ORDERED to pay attorney's fees of $11,672.50 to appellee American States within 10 days of the mandate in this case.

AFFIRMED

APPENDIX D

FILED
MAY 11 - 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH M. STERN,
Plaintiff-Appellant.

v.

FARMERS INSURANCE GROUP OF COMPANIES; TRUCK INSURANCE EXCHANGE; AMERICAN STATES INSURANCE COMPANY; DEAN GROSSMAN, individually and on behalf of the Grossman Family Trust; CORAZON GROSSMAN, individually and on behalf of the Grossman Family Trust; AMERICAN ECONOMY INSURANCE COMPANY; SAFECO CORPORATION; AMERICAN STATES FINANCIAL CORPORATION; LINCOLN NATIONAL CORPORATION,

Defendants-Appellees.

No. 99-55982

D.C. No. CV 99-07654CM

ORDER

Before: TASHIMA and FISHER, Circuit Judges, and ZILLY,

APPENDIX E

FILED
JUN 20 - 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH M. STERN,

Plaintiff-Appellant,

v.

FARMERS INSURANCE GROUP OF COMPANIES, ET AL.,

Defendant-Appellees.

No. 99-55980

D.C. No. CV-99-07654-CM

ORDER

Before: TASHIMA and FISHER, Circuit Judges, and ZILLY, District Judge.[1]

By prior memorandum disposition, this panel rules that the present appeal was frivolous and imposed attorney's fees in favor of appellee Farmers Insurance Group as a

[1] The Honorable Thomas Zilly, United States District Judge for the Western District of Washington, sitting by designation

District Judge.[1]

The panel has voted to deny the petition for panel rehearing. Judges Tashima and Fisher vote to deny the petition for rehearing en banc and Judge Zilly so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote n en banc rehearing. See Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

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[1] The Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX F

FILED
Aug 1 - 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH M. STERN,
Plaintiff-Appellant.

v.

FARMERS INSURANCE GROUP OF COMPANIES; TRUCK INSURANCE EXCHANGE; AMERICAN STATES INSURANCE COMPANY; DEAN GROSSMAN, individually and on behalf of the Grossman Family Trust; CORAZON GROSSMAN, individually and on behalf of the Grossman Family Trust; AMERICAN ECONOMY INSURANCE COMPANY; SAFECO CORPORATION; AMERICAN STATES FINANCIAL CORPORATION; LINCOLN NATIONAL CORPORATION.

Defendants-Appellees.

No. 99-55980

D.C. No. CV-99-07654-CM

Before: TASHIMA and FISHER, Circuit Judges, and ZILLY,

sanction against appellant Kenneth Stern.

Appellees Lincoln National Corporation and the Grossmans have now each filed a motion for attorney's fees based on the frivolous appeal. These motions are GRANTED. Appellant Kenneth Stern is ORDERED to pay attorney's fees of $5,000 to appellee Lincoln National Corporation, and to pay attorney's fees of $4,928.50 to appellee the Grossmans, within ten days of the mandate of this case.

Appellant Stern has filed a motion to have filed notice to judges considering suggestion for hearing en banc and petition for rehearing of potential lack of federal subject matter, and pendent, jurisdiction. This motion is DENIED.

Appellant Stern has filed a motion to recuse Judges Tashima, Fisher and Zilly, nunc pro tunc. This motion has no merit and is DENIED.

Appellant Stern is cautioned that a continuation of these repeated filings may be viewed by this panel as an abuse of the appellate process.

IT IS SO ORDERED.